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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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LEGAL AND SAFETY EMPLOYER
RESEARCH, INC.,

Plaintiff,

NO. CIV. S-00-1748 WBS/JFM

v.

MEMORANDUM AND ORDER

UNITED STATES DEPARTMENT OF
THE ARMY,

Defendant.

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This is an action brought by Legal and Safety Employer Research, Inc. ("LASER") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to enjoin the United States Department of the Army ("Army") from withholding construction performance evaluations prepared pursuant to 48 C.F.R. § 36.201. The matter is before the court on cross motions for summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Regulatory Framework

A. The evaluations

Construction performance evaluations must be prepared at the completion of every government construction project that

1 exceeds certain monetary limits. See 48 C.F.R. § 36.201. The
2 evaluations must be prepared within sixty days of substantial
3 completion of each project. See Engineering Regulation ("E.R.")
4 415-1-17(4)(b). The evaluations contain ratings that reflect the
5 contractor's performance in terms of cost, schedule, quality, and
6 compliance with regulatory standards.¹ (See Ex. B, Attached to
7 Compl.). There is also a space on each form for the evaluator to
8 provide written comments regarding the particular project.² Id.

9 The evaluating official is usually the "resident
10 engineer" with personal knowledge of the contractor's performance
11 on the project. See E.R. 415-1-17(5)(c)(1); see also 48 C.F.R. §
12 36.201(a)(2). The evaluating official is expected to be frank
13 and candid in his evaluation of the contractor's performance.
14 (See Decl. of Durham-Aguilera ¶ 5). The completed evaluation is
15 then reviewed for accuracy by an individual, who also has
16 personal knowledge of the contractor's performance, and is at a
17 supervisory level above that of the evaluating official. See
18 E.R. 415-1-17(c)(1); see also 48 C.F.R. § 36.201.

19 If the evaluating official concludes that a
20 contractor's overall performance was unsatisfactory, the
21 contractor must be notified in writing that a report of
22 unsatisfactory performance is being prepared. See E.R. 415-1-
23 17(c)(2). The contractor must then be given an opportunity to
24 submit written comments, which must be addressed and included in

25 ¹ The evaluator chooses from the following ratings: not
26 applicable, outstanding, above average, satisfactory, marginal,
27 or unsatisfactory. (See Ex. B, Attached to Compl.).

28 ² The reports are prepared using DD Form 2626. (See Ex. B,
Attached to Compl.); see also 48 C.F.R. § 236.201.

1 the final report. Id.

2 All performance evaluations, including any amendments
3 to unsatisfactory reports, are filed in a central database system
4 known as the Construction Contractor Appraisal Support System
5 ("CCASS"), where the information is stored for six years. See
6 E.R. 415-1-17(c)(2); see also 48 C.F.R. § 236.201. The
7 information in CCASS may then be used to assist the government in
8 making the decision to award a future contract. Id.; see 48
9 C.F.R. § 42.15.

10 B. Process for awarding government contracts

11 The Competition in Contracting Act ("CICA") requires
12 the Army, like other executive agencies, to use one of two
13 procurement methods to select the contract awarded when procuring
14 goods and services. See 10 U.S.C. §§ 2304, et seq.; see also 41
15 U.S.C. §§ 253, et seq. Those methods are: (1) "competitive
16 negotiation;" and (2) "sealed bidding." Regardless of the
17 procurement method used, the Army is required to consider a
18 contractor's past performance in making an award determination.
19 See 48 C.F.R. § 42.1501; see also 41 U.S.C. § 403(7)(c).

20 Pursuant to the Federal Acquisition Streamlining Act
21 ("FASA"), an offeror's³ past performance must be considered when
22 awarding a contract under the "competitive negotiation" method of
23 procurement. See Pub. L. No. 103-355, 108 Stat. 3272; see also
24 48 C.F.R. § 42.1501 (defining past performance information as
25 relevant information for future source selection purposes). The

26
27 ³ Under government contract law, prospective contractors
28 on sealed bidding procurements are referred to as "bidders,"
while prospective contractors on competitively negotiated
procurements are referred to as "offerors."

1 Office of Federal Procurement Policy ("OFPP") is required to
2 issue guidance to the relevant executive agencies on how to
3 consider past performance in making their award determinations.
4 See Pub. L. No. 103-355 § 1091(b), 108 Stat. 3243, 3272; see also
5 41 U.S.C. § 405(j).

6 The guidance issued by OFPP is codified in Title 48 of
7 the Code of Federal Regulations, known as the Federal Acquisition
8 Regulations ("FAR"). F.A.R. sections 15.304 and 15.305 make past
9 performance information a factor that must be considered in
10 evaluation of competitive negotiation procurements. See 48
11 C.F.R. §§ 15.304, 15.305. The Army may use the data stored in
12 CCASS to evaluate the past performance of an offeror during a
13 competitive negotiation. See 48 C.F.R. § 236.201(c).

14 When utilizing the "sealed bidding" method of
15 procurement, the government will award a contract to the lowest
16 bid of all "responsible bidders." In order to be found
17 "responsible," a bidder must have a satisfactory record of past
18 performance. See 41 U.S.C. § 403(7)(c); see also 48 C.F.R. §
19 9.104-1(c). If there is a serious deficiency in a bidder's
20 performance rating, he or she is presumed to be "non-responsible"
21 and thus, ineligible to receive a contract award. See 48 C.F.R.
22 § 9.104-3(b). The information regarding past performance in
23 CCASS is used to determine "responsibility." See E.R. 41-1-
24 17(4)(d).

25 II. Factual and Procedural Background

26 LASER has requested construction performance
27 evaluations of Nordic Industries, Inc. that were made at the
28 completion of several levee repair projects in California in late

1 1997 and early 1998 ("Nordic Reports"). The Army determined that
2 the rating information contained within the evaluations is not
3 releasable.

4 The Chief of the Contracting Division for the Corps of
5 Engineers District in Sacramento, Ruth Anne Ijames, determined
6 that disclosure of all performance evaluations would "jeopardize
7 the integrity and successful completion of agency procurements to
8 which the evaluations relate." (See Decl. of Ijames ¶ 6; see
9 also Def.'s Ex. 3 ¶ 1). In her memorandum dated October 6, 2000,
10 Ijames instructed the Contracting Division that "all such
11 evaluations should be marked 'Source Selection Information - Do
12 Not Release.'" (Def.'s Ex. 3 ¶ 2).

13 On August 14, 2000, LASER filed this action pursuant to
14 the FOIA, seeking to enjoin the Army from withholding the Nordic
15 Reports. The Army moves for summary judgment on the grounds that
16 the Nordic Reports are exempt from the FOIA under either
17 Exemption 3 or Exemption 5. LASER cross moves for summary
18 judgment on the grounds that the Nordic Reports are not exempt
19 from disclosure under either Exemption 3 or Exemption 5.

20 III. Discussion

21 The FOIA "mandates a policy of broad disclosure of
22 government documents." Church of Scientology v. Department of
23 the Army, 611 F.2d 738, 741 (9th Cir. 1980). "When a request is
24 made, an agency may withhold a document, or portions thereof,
25 only if the material at issue falls within one of the nine
26 statutory exemptions found in § 552(b)." Maricopa Audubon
27 Society v. United States Forest Service, 108 F.3d 1082, 1085 (9th
28 Cir. 1997); see Church of Scientology, 611 F.2d at 742. These

1 exemptions are "explicitly exclusive." Department of Justice v.
2 Tax Analysts, 492 U.S. 136, 151 (1989) (quoting FAA Administrator
3 v. Robertson, 422 U.S. 255, 262 (1975)). Furthermore, "these
4 exemptions 'must be narrowly construed' in light of FOIA's
5 'dominant objective' of 'disclosure, not secrecy.'" Maricopa
6 Audubon, 108 F.3d at 1085 (quoting Department of the Air Force v.
7 Rose, 425 U.S. 352, 361 (1976)).

8 "Summary judgment is a proper means of resolving a FOIA
9 claim." Assembly of the State of California v. United States
10 Department of Commerce, 797 F.Supp. 1554, 1559 (E.D. Cal.
11 1992) (citing National Wildlife Federation v. United States Forest
12 Service, 861 F.2d 114 (9th Cir. 1988)). The government agency
13 bears the burden of proving that a particular document falls
14 within one of the nine exemptions. See Kamman v. United States
15 Internal Revenue Service, 56 F.3d 46, 48 (9th Cir. 1995). The
16 government may submit affidavits to satisfy their burden, but the
17 government "'may not rely upon conclusory and generalized
18 allegations of exemptions.'" Id. (quoting Church of Scientology,
19 611 F.2d at 742). Affidavits submitted by the government must
20 contain "'reasonably detailed descriptions of the documents and
21 allege facts sufficient to establish an exemption.'" Kamman, 56
22 F.3d at 48 (quoting Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.
23 1987)).

24 A. Exemption 3

25 Pursuant to 5 U.S.C. § 552(b)(3) ("Exemption 3"), the
26 government may not disclose records that are:

27 specifically exempted from disclosure by statute (other
28 than section 552b of this title) provided that such
statute (A) requires that the matters be withheld from

1 the public in such a manner as to leave no discretion
2 on the issue, or (B) establishes particular criteria
3 for withholding or refers to particular types of
4 matters to be withheld.

5 5 U.S.C. § 552(b)(3).

6 "The aim of exemption 3 is to incorporate only those
7 statutes where it is clear that the basic policy decision in
8 favor of nondisclosure has been made by the Legislative rather
9 than by the Executive Branch." Long v. IRS, 742 F.2d 1173, 1179
10 n.14 (9th Cir. 1984) (citing American Jewish Congress v. Kreps,
11 574 F.2d 624, 628 (D.C. Cir. 1978)). Exemption 3 is written in
12 the disjunctive, thus, a statute is a nondisclosure statute if it
13 satisfies either subsection A or subsection B. See Lessner v.
14 U.S. Dept. of Commerce, 827 F.2d 1333 (9th Cir. 1987).

15 The statute upon which defendant relies in its
16 assertion of Exemption 3 is 41 U.S.C. § 423(a)(1), also known as
17 the Procurement Integrity Act, which provides that:

18 A person described in paragraph (2) shall not, other
19 than as provided by law, knowingly disclose contractor
20 bid or proposal information or source selection
21 information before the award of a Federal agency
22 procurement contract to which the information relates.

23 41 U.S.C. § 423(a)(1).

24 At oral argument, defendant conceded that 41 U.S.C. §
25 423 does not qualify as a nondisclosure statute under subsection
26 A because the Army is given discretion to determine what
27 materials constitute "source selection information." American
28 Jewish Congress, 574 F.2d at 628 (Subsection A "embraces only
those statutes incorporating a congressional mandate of
confidentiality that, however general, is absolute and without
exception.")

1 The court therefore looks to subsection B to determine
 2 whether exemption 3 applies. A statute is a nondisclosure
 3 statute under subsection B if it: (1) establishes particular
 4 criteria for the withholding of records; or (2) refers to the
 5 particular types of material to be withheld. See 5 U.S.C. §
 6 552(b)(3)(B). To satisfy subsection B, a statute must limit
 7 agency discretion to a particular item or class of items, or it
 8 must limit agency discretion by prescribing guidelines for the
 9 exercise of that discretion. See Long, 742 F.2d at 1178.

10 In 41 U.S.C. § 423, Congress limited agency discretion
 11 to withhold information to, "source selection information," then
 12 carefully identified documents that make up source selection
 13 information. See 41 U.S.C. § 423(a)(1); see also 41 U.S.C. §
 14 423(f)(2)(A)-(J).⁴ Accordingly, the court is satisfied that

15
 16 ⁴ The term "source selection information" means any of
 17 the following information prepared for use by a Federal agency
 18 for the purpose of evaluating a bid or proposal to enter into a
 19 Federal agency procurement contract, if that information has not
 20 been previously made available to the public or disclosed
 21 publicly:

22 (A) Bid prices submitted in response to a Federal
 23 agency solicitation for sealed bids, or lists of those bid prices
 24 before public bid opening.

25 (B) Proposed costs or prices submitted in response to a
 26 Federal agency solicitation, or lists of those proposed costs or
 27 prices.

28 (C) Source selection plans.

 (D) Technical evaluation plans.

 (E) Technical evaluations of proposals.

 (F) Cost or price of evaluations of proposals.

 (G) Competitive range determinations that identify
 proposals that have a reasonable chance of being selected for
 award of a contract.

 (H) Rankings of bids, proposals, or competitors.

 (I) The reports and evaluations of source selection
 panels, boards, or advisory councils.

 (J) Other information marked as "source selection
 information" based on a case-by-case determination by the head of
 the agency, his designee, or the contracting officer that its

1 section 423 is a nondisclosure statute under Exemption 3,
2 subsection B.

3 However, the court cannot find that the Nordic Reports
4 fall within any of the categories of information defined in
5 section 423. Defendant relies upon the "case-by-case"
6 determination under 41 U.S.C. § 423 (f)(2)(J) to support its
7 contention that the reports were properly withheld. In order to
8 be withheld under subsection J, information must first be
9 determined useful on a case-by-case basis, and then the document
10 must be marked accordingly. That is not what occurred here.

11 In this matter, Ijames issued a memorandum in October,
12 2000, after the FOIA request was made, declaring all contract
13 evaluations to be source selection information and instructing
14 that they be marked as such. (See Decl. of Ijames ¶ 6; see also
15 Def.'s Ex. 3 ¶ 2). This is a sweeping, categorical
16 determination, not the "case-by-case" determination required by
17 the statute. Ijames did not consider whether the Nordic Reports
18 were going to be used as source selection information during a
19 procurement. In fact, at the time of the FOIA request, the
20 Nordic Reports were not even marked as "source selection
21 information." Accordingly, the Nordic Reports are not exempt
22 from the FOIA under Exemption 3.

23 B. Exemption 5

24 Alternatively, defendant relies upon 5 U.S.C. §
25 552(b)(5) ("Exemption 5") to support its contention that the

26 _____
27 disclosure would jeopardize the integrity or successful
28 completion of the Federal agency procurement to which the
information relates. 41 U.S.C. § 423(f)(1)(A)-(J).

1 Nordic Reports are exempt from disclosure. Under Exemption 5,
2 the reports are exempt from disclosure if they are: (1) inter- or
3 intra-office memoranda; and (2) consist of material that would
4 not be available by law to a party in litigation with the agency.
5 See 5 U.S.C. § 552(b)(5); see also Assembly of the State of
6 California, 797 F.Supp. at 1559.

7 The parties do not contest that the Nordic Reports
8 satisfy the first prong. Thus, the only issue for the court to
9 decide is whether the evaluations satisfy the second prong. "The
10 second prong of the analysis of Exemption 5 has been interpreted
11 to incorporate several discovery privileges enjoyed by government
12 in litigation with private parties." Id. at 1561 (citing United
13 States Dept. of Justice v. Julian, 486 U.S. 1, 11-12 (1988)).
14 Here, defendant asserts the "deliberative process" privilege.

15 To qualify for exemption under the deliberative process
16 privilege, a document must be both "antecedent to the adoption of
17 agency policy" and "deliberative," meaning "it must actually be
18 related to the process by which policies are formulated."
19 National Wildlife Federation v. United States Forest Service, 861
20 F.2d 1114, 1117 (9th Cir. 1988) (emphasis in original); see
21 Judicial Watch, Inc. v. Clinton, 880 F.Supp. 1 (D.D.C. 1995)
22 (citing Jordan v. United States Department of Justice, 591 F.2d
23 753, 774 (D.C. Cir. 1978)). "These twin requirements recognize
24 that the underlying purpose of this privilege is to "protect[]
25 the consultative recommendations, and deliberations, comprising
26 part of a process by which governmental decisions and policies
27 are formulated.'" Id. (quoting Jordan, 591 F.2d at 774).

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1 However, a document need not contain actual
2 recommendations on law or policy to qualify for Exemption 5.
3 National Wildlife Federation, 861 F.2d at 1118 (citing Vaughn v.
4 Rosen, 523 F.2d 1136, 1144 (D.C. CIR. 1975)). "Where either the
5 disclosure of the manner of selecting or presenting facts would
6 expose the deliberative process, or where facts are 'inextricably
7 intertwined' with 'policy-making processes,' the material is
8 exempt." National Wildlife Federation, 861 F.2d at 1119 (citing
9 Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. CIR.
10 1980)).

11 The aim of Exemption 5 is "to prevent the disruption of
12 a free flow of ideas, opinions, advice and frank discussions
13 within agencies concerning their policies and programs."
14 National Wildlife Federation, 861 F.2d at 1117 (quoting Julian,
15 806 F.2d at 1419). For example, in Judicial Watch, the court
16 found that a proposed memorandum setting forth "a detailed policy
17 evaluation which the agency ultimately elected not to issue," was
18 antecedent to the adoption of agency policy even though the
19 agency chose not to adopt the proposed policy, and thus the
20 memorandum was exempt from disclosure pursuant to Exemption 5.
21 See Judicial Watch, 880 F.Supp. at 13. The court also found that
22 a proposed response to a congressional inquiry was antecedent to
23 the adoption of agency policy, because it was not the final,
24 published position of the agency. See id.

25 Other examples of the type of policy decisions
26 contemplated by Exemption 5 include the draft Environmental
27 Impact Statements and draft Forest Plans, prepared by the Land
28 Management Planning Office of the Forest Service in National

1 Wildlife Federation, 861 F.2d at 1123. In National Wildlife
2 Federation, the Ninth Circuit found that these "Washington Office
3 previews [did] not constitute statements of final, binding agency
4 policy" and thus were exempt from disclosure pursuant to
5 Exemption 5. Id.

6 The type of evaluations at issue in this matter are
7 quite different. These evaluations are created at the completion
8 of every government construction project that exceeds certain
9 monetary limits. See 48 C.F.R. § 36.201. They contain ratings
10 that reflect the contractor's performance in terms of cost,
11 schedule, quality, and compliance with regulatory standards.
12 (See Ex. B, Attached to Compl.). There is also a space on each
13 form for the evaluator to provide written comments regarding the
14 particular project.⁵ Id. The evaluations are then stored in
15 CCASS and may be used in the future for determining whether to
16 award government procurement contract. As a result, the nature
17 of the evaluations can be characterized as both predecisional and
18 postdecisional.


19 However, even if these evaluations are characterized
20 as predecisional, the decision they would precede is not a
21 "policy decision," as required by Exemption 5. Defendant does
22 not cite, and the court cannot find any authority to support a
23 finding that the decision to award a government procurement
24 contract is the type of policy decision contemplated by Exemption

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27
28 ⁵ No written comments were made on the Nordic Reports.
(See Ex. B, Attached to Compl.).

1 5.⁶ Accordingly, the evaluations are not exempt under Exemption
2 5.

3 IT IS THEREFORE ORDERED that plaintiff's motion for
4 summary judgment be, and the same hereby is, GRANTED; and that
5 defendant's motion for summary judgment be, and the same hereby
6 is, DENIED. Defendant is ordered to disclose the requested
7 evaluations to plaintiff, without redaction.

8 DATED: May 4, 2001

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11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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27 ⁶ Because the court finds they do not relate to a policy
28 decision, the court need not determine whether the Nordic Reports
are deliberative.

United States District Court
for the
Eastern District of California
May 7, 2001

* * CERTIFICATE OF SERVICE * *

2:00-cv-01748

Legal and Safety

v.

United States Army

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 7, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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